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NO. 94-2035

In The
Supreme Court of The United States
October Term 1994

JOSEPH S. GREGORI, M.D., AND JOSEPH S. GREGORI, M.D., INC., Individually and as employer and administrator of Pension Plan and Trust,

Petitioners,

v.

DIANE A. SCHWARTZ,

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

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REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This case presents a novel question of federal law which forms the basis for a conflict among the Circuits and with respect to which the Sixth Circuit has departed from previous decisions of this Court; namely, whether a monetary award of back pay and front pay for violations of Section 510 of the Employee Retirement Income Security Act of 1974 (hereinafter "ERISA"), 29 U.S.C. § 1140 can properly be characterized as equitable relief so as to be available under ERISA § 502(a)(3)(B), 29 U.S.C. § 1132(a)(3)(B)?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

REASONS FOR GRANTING CERTIORARI . . 1

I. THE CASES UPON WHICH SCHWARTZ RELIES FOR THE PROPOSITION THAT BACK PAY AND FRONT PAY AWARDS FOR VIOLATIONS ERISA § 510 ARE AVAILABLE PURSUANT TO ERISA § 502(a)(3)(B) DO NOT ACCURATELY REFLECT THE CURRENT STATE OF THE LAW. 3

II. THE SIXTH CIRCUIT'S HOLDING IN THIS CASE IS INCONSISTENT WITH THIS COURT'S DECISIONS 9

III. THE PURPOSES OF ERISA § 510 CAN BE SATISFIED WITHOUT THE NEED FOR AWARDS OF BACK PAY AND FRONT PAY 13

IV. THE SIXTH CIRCUIT'S DECISION IS IN CONFLICT THE DECISIONS OF THE EIGHTH, ELEVENTH AND DISTRICT OF COLUMBIA CIRCUITS 15

CONCLUSION 18

TABLE OF AUTHORITIES

Page

Cases

Allison v. Dugan, 737 F.Supp. 1043 (N.D.Ind. 1990) 4, 5

Allison v. Dugan, 951 F.2d 828 (7th Cir. 1992) 5

Bittner v. Sadoff and Rudoff Industries, 490 F.Supp. 534 (E.D.Wis. 1980) 3-5, 7, 8

Chauffers, Teamsters and Helpers Union Local No. 391 v. Terry, 494 U.S. 558 (1990) 8, 12, 14

Crocker v. Piedmont Aviation, Inc., 49 F.3d 735 (D.C.Cir. 1995) 11, 16-18

Folz v. Marriott, 594 F.Supp. 1007 (W.D.Mo. 1984) 3, 6-8

Lafoy v. HMO Colorado, 988 F.2d 97 (10th Cir. 1993) 7

Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928 (7th Cir. 1989) 5

Massachusetts Mutual Life Insurance Co. V. Russell, 473 U.S. 134 (1985) 4-7, 15

McGath v. Auto Body North Shore, Inc., 7 F.3d 665 (7th Cir. 1993) 13

Mertens v. Hewitt Associates, 113 S.Ct. 2063 (1993) 3, 5, 7, 8, 11, 12

Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960) 9-13

Setser v. Novack Investment Co., 638 F.2d 1137 (8th Cir.) amended en banc., 657 F.2d 962, cert. denied, 454 U.S. 1064 (1981) 15-18

Waldrop v. Southern Company Services, Inc., 24 F.3d 152 (11th Cir. 1994) 16-18

West v. Butler, 621 F.2d 240 (6th Cir. 1980) 13

Statutes

ERISA § 502(a)(3)(B) i, 3, 7-9, 12, 17

ERISA § 510 . . . . . i, 3, 7, 8, 13

Fed.R.Civ.P. 11 5

Other

S.Rep. No. 93-127, 93rd Cong. 2d. Sess., reprinted in 1974 U.S. Code Cong. & Ad. News at 4871 6

IN THE
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JOSEPH S. GREGORI, M.D. AND JOSEPH S. GREGORI, M.D., INC., Individually and as employer and administrator of Pension Plan and Trust, Petitioners,
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Appeals For The Sixth Circuit

REPLY BRIEF OF PETITIONERS IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

REASONS FOR GRANTING CERTIORARI

In her Brief in Opposition to the Petition for a Writ of Certiorari of Petitioners Joseph S. Gregori, M.D. and Joseph S. Gregori, M.D., Inc. (hereinafter "Gregori"), Respondent, Diane A. Schwartz (hereinafter "Schwartz"), presents four arguments in support of her position that this Court should not grant a writ of certiorari in

the above-captioned matter. All four of Schwartz's arguments, however, are legally and logically flawed.

Indeed, in several instances Schwartz's arguments merely serve to highlight the potential confusion lower Court's will face in trying to reconcile the Sixth Circuit's decision in this case with the existing precedents of not only this Court, but those of other Circuit Courts of Appeal. The issue presented by this case is one that is ripe for consideration by this Court so as to eliminate that potential confusion and prevent any further divergences among the Circuit Courts of Appeals on the issue of whether back pay and front pay constitute equitable or legal relief in the context of a wrongful discharge or wrongful failure to hire.

I. THE CASES UPON WHICH SCHWARTZ RELIES FOR THE PROPOSITION THAT BACK PAY AND FRONT PAY AWARDS FOR VIOLATIONS ERISA § 510 ARE AVAILABLE PURSUANT TO ERISA § 502(a)(3)(B) DO NOT ACCURATELY REFLECT THE CURRENT STATE OF THE LAW.

In Section I of her Opposition Brief, Schwartz relies on Folz v. Marriott, 594 F.Supp. 1007 (W.D.Mo. 1984) and Bittner v. Sadoff and Rudoff Industries, 490 F.Supp. 534 (E.D.Wis. 1980) for the proposition that other Courts have recognized that back pay and front pay can be awarded for violations of ERISA § 510 pursuant to ERISA § 502(a)(3)(B). Neither of these decisions, however, represent the current state of the law and both have been rejected in subsequent decisions. Both Folz and Bittner were decided prior to this Court's pronouncements in Mertens v. Hewitt Associates, 113 S.Ct. 2063 (1993)

and Massachusetts Mutual Life Insurance Co. V. Russell, 473 U.S. 134 (1985), regarding the correct interpretation of the phrase "other equitable relief" as it is used in the context of ERISA.

In Allison v. Dugan, 737 F.Supp. 1043 (N.D.Ind. 1990), a plaintiff who sought to rely on Bittner was rebuked as follows:

> Additionally, Allison relies upon the case of Bittner v. Sadoff and Rudoy Industries, 490 F.Supp. 534 (E.D.Wis. 1980), in support of his claim for punitive damages. Allison ignores the fact that the holding in this case has clearly been superseded by the decision of the United States Supreme Court in Massachusetts Mutual Life Insurance Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985).
>
> While it does not appear that Allison's claims for compensatory and punitive damages or demand for jury trial was made for any improper purpose or in bad faith, it does appear that counsel for

> Allison neglected to make reasonable inquiry into the applicable law of this Circuit before making these claims for damages and jury demand.

Allison, 737 F.Supp. at 1050. In fact, the Allison Court then went on to impose sanctions on plaintiff's counsel pursuant to Fed.R.Civ.P. 11 for his baseless reliance on Bittner[1], noting that "an empty head but a pure heart is no defense" to sanctions under Rule 11. Allison, 737 F.Supp at 1051 quoting Mars Steel Corp. v. Continental Bank, N.A., 880 F.2d 928, 932 (7th Cir. 1989). In light of this Court's decisions in Mertens and Russell Schwartz's reliance on Bittner is unsupportable.

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[1]Though the imposition of sanctions was overturned on appeal, Allison v. Dugan, 951 F.2d 828 (7th Cir. 1992), the fact that a Court would even consider imposing them reflects upon the weakness of the Bittner decision as a persuasive precedent.

Schwartz's reliance on Folz is likewise misplaced. The Court in Folz relied heavily on legislative history which stated that Congress intended "to provide the full range of legal and equitable remedies" under ERISA. Folz, 594 F.Supp. at 1015, citing S.Rep. No. 93-127, 93rd Cong. 2d. Sess., reprinted in 1974 U.S. Code Cong. & Ad. News at 4871. This Court in Russell, however, correctly noted that this committee report described a draft version of ERISA that specifically provided for legal relief, but that the bill ultimately passed did not contain the provision allowing for legal relief. Russell, 473 U.S. at 145-46 and n. 14.

The Tenth Circuit, which had at one time also erroneously relied upon this legislative history, recently

acknowledged its mistake, and held that these provisions do not support the contention that ERISA § 502(a)(3)(B) allows legal relief. Lafoy v. HMO Colorado, 988 F.2d 97, 100, n. 4 (10th Cir. 1993).

Schwartz's reliance on Folz and Bittner for the proposition that Courts have recognized that back pay and front pay can be awarded for violations of ERISA § 510 pursuant to ERISA § 502(a)(3)(B) is misplaced. Schwartz fails to recognize or address the effect that this Court's decisions in Mertens and Russell had on the reasoning used by the District Courts in Folz and Bittner. Schwartz's reliance on these decisions merely demonstrates the weakness of her arguments.

To date, no court other than the Sixth Circuit in the case sub judice, has applied this Court's holdings in Mertens, Russell and Chauffeurs, Teamsters and Helpers Union Local No. 391 v. Terry, 494 U.S. 558 (1990) to the issue of whether back pay and front pay can be awarded for violations of ERISA § 510 pursuant to ERISA § 502(a)(3)(B). It is imperative that this Court grant Gregori's Petition for a Writ of Certiorari in order to prevent further misapplication of outdated cases such as Folz and Bittner. Indeed, the District Court justified its award of back pay and front pay to Schwartz in part on its misplaced reliance on these cases.[2] Unless this Court addresses this issue, similar

[2]See page A67 of Gregori's Petition for a Writ of Certiorari.

misapplications of ERISA § 502(a)(3)(B), particularly in light of the Sixth Circuit's decision in this case, will inevitably continue to occur.

II. THE SIXTH CIRCUIT'S HOLDING IN THIS CASE IS INCONSISTENT WITH THIS COURT'S DECISIONS.

In Section II of her Opposition Brief, Schwartz argues that Gregori misinterprets this Court's decision in Mitchell v. Robert DeMario Jewelry, Inc., 361 U.S. 288 (1960) by distinguishing between the back pay awarded for uncompensated overtime and the back pay awarded for the employer's wrongful discharge of the plaintiff. It is Schwartz, however, who improperly concludes that the back pay related to the discriminatory discharge in Mitchell was awarded based on restitution.

It is not unimportant to note that the only mention Mitchell made of restitution was when it referred to "restitution of partial deficiencies in wages due for past work." Mitchell, 361 U.S. at 293. Notably absent from the portions of Mitchell which considered whether back pay for a wrongful discharge was available, is any mention of restitution.

Rather, Mitchell went on to consider whether such an award of back pay was within the Court's equitable jurisdiction. This Court ultimately concluded that the language of the Fair Labor Standards Act did not preclude the Court from awarding back pay for the discriminatory discharge. In reaching this conclusion, the Court stated the

"measure of reimbursement is compensatory only." Mitchell, 361 U.S. at 293.[3]

From the above discussion of Mitchell, it becomes clear that the Sixth Circuit's interpretation of Mitchell conflicts with this Court's holding in Mertens. Mertens, in direct contrast to Mitchell, held that ERISA *does* limit a Court's equitable jurisdiction to those remedies traditionally recognized as equitable. Mertens, 113 S.Ct. at 2068.

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[3]This Court immediately followed that pronouncement with the following language, which has been cited by Schwartz as evidence that this Court intended the back pay awarded in connection with the unlawful discharge to be restitutionary:

> Respondents cannot be heard to assert that wages are ordered to be paid for services which were not performed, for it was the employer's own unlawful conduct which deprived the employees of their opportunity to render services.

Mitchell, 361 U.S. at 293. This passage merely clarifies that the plaintiff was being compensated for the unlawful loss of his job, rather than work performed. As recognized by Crocker v. Piedmont Aviation, Inc., 49 F.3d 735, 747 (D.C.Cir. 1995), this type of compensatory relief is not restitutionary.

Because of this limitation, Mertens held that compensatory money damages are not available pursuant to ERISA § 502(a)(3)(B). Mertens 113 S.Ct. at 2068. This is, however, precisely how Mitchell described the award of back pay for a wrongful discharge. Thus, the interpretation of Mitchell adopted by the Sixth Circuit puts it in direct conflict with Mertens. Such a result must be avoided.

While it is true that this Court in Terry recognized that Mitchell is an example of a situation where back pay can be characterized at restitutionary, it does not follow, as the Sixth Circuit seems to believe, that Terry was referring to back pay for wrongful discharge. Rather, it makes more sense that this Court was referring to the back

pay it expressly referred to in Mitchell as restitutionary, i.e. back pay for undercompensated overtime.

III. THE PURPOSES OF ERISA § 510 CAN BE SATISFIED WITHOUT THE NEED FOR AWARDS OF BACK PAY AND FRONT PAY.

In section III of her Reply Brief, Schwartz contends that awards of back pay and front pay in connection with ERISA § 510 are appropriate remedies because the statute was intended to protect the employment relationship. While Gregori does not disagree with this basic proposition, Gregori contends that ERISA § 510 was designed to protect the employment relationship *only* because it gives rise to pension benefits. See West v. Butler, 621 F.2d 240 (6th Cir. 1980) and McGath v. Auto Body North Shore, Inc., 7 F.3d 665 (7th Cir. 1993). This is in contrast to other employment

discrimination statutes such as Title VII, which protect the employment relationship for its own sake.

Schwartz, in her Opposition Brief, fails to recognize this distinction. This distinction, however, is the basis for Congress' decision to provide different remedies in the various employment statutes. With respect to ERISA, Congress has determined that the employment relationship that gives rise to pension benefits can be adequately protected through the remedies provided by the statute, which do not include legal relief such as back pay and front pay.

As recognized by Terry, Congress, in enacting Title VII, expressly stated that back pay would be an available remedy. Terry, 494 U.S. at 572. Congress made no

such pronouncement in connection with ERISA. Indeed, after initially considering drafts of ERISA which provided for legal relief, Congress settled on a version that provided for only equitable relief. Russell, 473 U.S. at 145-46 and n. 14.

By expanding the scope of remedies intended by Congress, the Sixth Circuit has impermissibly broadened the statute beyond its intended purview. For this reason, this Court must grant Gregori's Petition for a Writ of Certiorari.

IV. THE SIXTH CIRCUIT'S DECISION IS IN CONFLICT THE DECISIONS OF THE EIGHTH, ELEVENTH AND DISTRICT OF COLUMBIA CIRCUITS.

In Section IV of her Opposition Brief, Schwartz attempts to distinguish Setser v. Novack Investment Co., 638 F.2d 1137 (8th Cir.) amended en banc., 657

F.2d 962, cert. denied, 454 U.S. 1064 (1981), Waldrop v. Southern Company Services, Inc., 24 F.3d 152 (11th Cir. 1994) and Crocker v. Piedmont Aviation, Inc., 49 F.3d 735 (D.C.Cir. 1995) on the grounds that they deal with statutes other than ERISA.

This distinction, however, does not affect the underlying analysis undertaken by those Courts regarding whether back pay in the context of a discriminatory discharge or failure to hire was restitution. That analysis must necessarily be the same regardless of what statute is being considered.

When the Courts in Setser, Waldrop and Crocker analyzed the various statutes in question, they were not doing so in order to determine whether back pay was restitutionary. Rather, they were

looking at the statutes under review to determine if back pay was an available remedy under such statutes.

In Setser, Waldrop and Crocker, the issue of whether back pay was an equitable or legal remedy was important because it determined whether a jury would be available. Thus, the courts first had to look at whether back pay could be awarded. Once the courts determined that back pay was an available remedy, the courts next looked to whether the back pay was legal or equitable. It was in this context that the Courts addressed the issue of whether the back pay constituted restitution.

With respect to this case, the analysis is essentially reversed. Here, this Court has already determined that pursuant to ERISA § 502(a)(3)(B), only

equitable relief is available. Thus, the critical issue in this case is whether back pay is equitable relief. As in Setser, Waldrop and Crocker, that analysis is done independent of the statute involved.

The Sixth Circuit's determination that the back pay and front pay awarded to Schwartz in connection with her unlawful termination was an equitable restitutionary award is clearly in direct conflict with the determination of the Setser, Waldrop and Crocker Courts that back pay in a wrongful discharge or failure to hire context constitutes legal, compensatory money damages.

CONCLUSION

For the foregoing reasons, as well as those reasons set forth in Gregori's Petition for Writ of Certiorari, a writ

of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on January 31, 1995.

Respectfully submitted,

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